

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SECOND APPEAL No 407 of 1981

For Approval and Signature:

Hon'ble MR.JUSTICE H.R.SHELAT

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1. Whether Reporters of Local Papers may be allowed : NO  
to see the judgements?
2. To be referred to the Reporter or not? : NO
3. Whether Their Lordships wish to see the fair copy : NO  
of the judgement?
4. Whether this case involves a substantial question : NO  
of law as to the interpretation of the Constitution  
of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge? : NO

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AHER BHIKA BHAGWAN

Versus

BHARWAD LAKHA GHELA  
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Appearance:

MR PV HATHI for appellant.

MR YS MANKAD for Respondent.  
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CORAM : MR.JUSTICE H.R.SHELAT

Date of decision: 17/11/2000

ORAL JUDGEMENT

Being aggrieved by the judgment and decree dated 24th day of June 1981 passed by the then learned Extra Assistant Judge, Bhavnagar in Regular Civil Appeal No. 70/78 allowing the appeal and dismissing the suit with costs by reversing the judgment and decree passed by the then learned Civil Judge (JD), Palitana on 20th April 1978 in Regular Civil Suit No. 35 of 1975 whereby decree was passed against the respondent ordering him to handover the actual possession of the suit land bearing Survey No. 285 to the present appellant and also

ordering to pay the cost.

2. The appellant claims to be the agriculturist having the agricultural land within the Sim of Village Thadech in Bhavnagar district. Rana Naja Aher was also having the agricultural land within the same Sim. The Survey number of the field owned by Rana Naja was 285. It was known as Malwan-ni-vadi. He sold the same to the respondent for Rs. 500/= by a registered deed dated 22nd February 1956. That sale deed is produced at Ex.95. After the sale both were not keeping harmonious relations and one or another dispute between the two continued. To bury the hatch forever and have a peace & harmony between the two, the respondent sold the said land back to Rana Naja for Rs. 350/= executing the sale deed dated 2nd December 1958. That sale deed is produced at Ex.115. Since then the said field continued to be of the ownership and in possession of Rana Naja. He was getting the same cultivated through different persons and took the yield thereof. The respondent was having no right, title and interest in the said land. Rana Naja then sold the said field to the appellant on 21st February 1975 for Rs. 5000/= executing the registered sale deed produced at Ex.69. The appellant was then put into the actual possession of the field. Since that day, the appellant is cultivating the said field. Touching to the field the respondent is also having another field and in between the two fields, there is a Ketki hedge North to South in length. The respondent playing the mischief got his name mutated in the revenue record and came out with a say that he was in possession of the land sold to the appellant by Rana Naja and started to interfere with the agricultural operations carried out by the present appellant and also started to obstruct him from cultivating the field. The appellant had therefore no way out but to file the suit for a declaratory and injunctive relief that the respondent was having no right, title and interest in the field, and respondent be restrained from interfering with his possession and cultivation. During the pendency of the suit, the Plaint was got amended and possessory relief was also sought because of a particular case raised in the written statement by the respondent. The respondent claimed possession on the basis of the entry made in the revenue record. The learned Civil Judge (JD), Palitana, framed necessary issues in Regular Civil Suit No. 35 of 1975 filed by the present appellant and appreciating the evidence before him, he on 20th April 1975 passed the decree in favour of the appellant directing the respondent to hand over the actual possession of the field Survey No. 285 to the present appellant and

ordered to pay the costs. Against that judgment and decree the respondent preferred Regular Civil Appeal No. 70 of 1978 in the Court of the District Judge at Bhavnagar which was assigned to the then learned Extra Assistant Judge, Bhavnagar. During the pendency of the appeal, the learned Extra Assistant Judge permitted the respondent to raise a new ground for the purpose of assailing the judgment and decree. It was to the effect that in view of Section 54 of the Saurashtra Gharkhed Tenancy Settlement and Agricultural Lands Ordinance, 1959, the sale effected by the respondent in favour of Rana Naja executing the sale deed on 2nd December 1958 (Ex.115) was void as Rana Naja was not the agriculturist. Rana Naja had not acquired any legal and valid title under the sale deed Ex.115 as he acquired no right, title and interest legally. He had no better title to pass in favour of the present appellant and consequently the present appellant also acquired no right, title and interest in the land in question despite the sale deed Ex. 69 having been executed by Rana Naja in favour of the plaintiff. Considering the rival contentions and accepting the new plea that was raised by the respondent the learned Extra Assistant Judge allowed the appeal, reversed the judgment and decree passed by the learned Civil Judge (JD), Palitana and dismissed the suit with costs on 24th day of June 1981. It is against that judgment and decree, this Second Appeal is filed.

3. In Second Appeal, the scope of inquiry is very limited. Only on substantial question of law the same can be heard and disposed of. In view of such law, at the time of admission hearing the questions of law were framed and they are as follows :

(1) Whether the learned Asstt. Judge committed a substantial error of law in holding that the transaction of sale effected by Exhibit 15 dated 2-12-1958 between respondent and Rana Naja was void and therefore Rana Naja had not acquired any legal and valid title that could pass in favour of the plaintiff by sale Deed dated 21-12-1975.

(2) Whether the learned Asstt. Judge committed a substantial error of law in constricting the scope and ambit section 54 of the Saurashtra Ordinance No.41 of 1949.

(3) Whether the learned Judge justified in permitting the respondent to raise the contention regarding bar of section 54 for the first time in appeal which has ultimately resulted in reversal of the judgment and decree passed by the learned trial Judge in favour of appellant.

Virtually, the question that arises for consideration is whether the learned appellate Judge was right in permitting to raise new question or plea and if he was right whether his finding on that new ground is maintainable.

4. Ordinarily, in appeal the new ground requiring factual investigation should not be permitted to be raised, but if after allowing the amendment the same is permitted to be raised, the course open to the appellate Court is to frame the issue and remand the matter to the trial Court for recording the evidence on that new plea and finding thereof. It seems the learned Extra Assistant Judge when the plea was raised found that it was purely a question of law and therefore he permitted to raise the issue and accepting that new issue which is stated hereinabove he allowed the appeal, but he missed to take a note of the fact that it was not involving a pure question of law but it involved a mixed question of law and facts. Whether Rana Naja after selling the field in question to the present respondent ceased to be the agriculturist was the point required to be considered and for that evidence was required to be led but the learned Extra Assistant Judge without considering the fact that evidence was required to be led, he proceeded to dispose of the appeal under the assumption that Rana Naja had ceased to be the agriculturist and then dispose of the appeal giving the aforesaid finding. The appellant is therefore condemned unheard because he did not get the opportunity to lead the evidence and show that after Rana Naja sold the field in question to the respondent, he (Rana Naja) had not ceased to be the agriculturist. He continued to be so as he was cultivating other fields. As the lower Court had not also framed any issue in this regard, the appellant had also led no evidence and even during the course of the hearing in the trial Court, no question was put to the appellant seeking his explanation. The appellant is, thus, condemned unheard. The learned Extra Assistant Judge instead of proceeding to dispose of the appeal hearing the parties ought to have framed the issue qua the new plea he permitted to be raised and remanded the said issue to the trial Court for the purpose of hearing the parties on that issue and

giving finding. As that is not done, the appellant's rights to plead his case & submit in that regard is jeopardised and he is condemned unheard, with the result, the decision rendered by the learned Extra Assistant Judge cannot be maintained. The same is required to be set aside and the issue which the learned Extra Assistant Judge permitting to raise new plea is required to be decided considering the evidence that may be led by both the parties.

5. In view of the matter, the appeal is required to be allowed and the suit is required to be sent back to the trial Court for hearing the parties on the new plea and disposal of the suit in accordance with law. The trial Court shall hear the parties on the issue whether the sale effected by the respondent in favour of Rana Naja executing the registered sale deed Ex. 115 executed on 2nd December 1958 and the sale effected by Rana Naja in favour of the appellant on 22nd February 1975 executing registered sale deed Ex. 69 are void, in view of Section 54 of the Saurashtra Gharkhed Tenancy Settlement and Agricultural Lands Ordinance, 1949.

6. For the aforesaid reasons, the appeal is allowed. The judgment and decree passed by the learned Extra Assistant Judge and also by the trial Court are hereby set aside. Regular Civil Suit No. 35 of 1975 is remanded to the Civil Judge (JD) at Palitana who shall giving reasonable opportunity to both the parties on the aforesaid issue, record the evidence and dispose the suit of in accordance with law within a period of 3 months from the receipt of the Record & Proceedings from this Court, and shall report having so done within a week thereafter to this Court.

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